

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

AVIATION WEST,
COMPETITION SPECIALTIES, INC.,
COMPUTER GROUP INC.,
THE AMERICAN TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
LORILLARD TOBACCO COMPANY,
PHILIP MORRIS, INC.,
R. J. REYNOLDS TOBACCO COMPANY,

Plaintiffs,

v.

THE WASHINGTON STATE DEPARTMENT OF LABOR
AND INDUSTRIES,
MARK BROWN, DIRECTOR OF THE WASHINGTON
STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Defendants.

NO. _____

COMPLAINT AND
PETITION FOR
DECLARATORY
JUDGMENT AND
INJUNCTIVE RELIEF

The plaintiffs named above allege as follows:

NATURE OF THE ACTION

1. The plaintiffs in this action are challenging a regulation issued by the Washington Department of Labor and Industries ("L&I") that effectively would ban smoking in thousands of private office work environments throughout the State of

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Washington beginning September 1, 1994 [REDACTED]

et seq.), smoking in private offices would be limited to "designated smoking rooms." Such rooms would have to be ventilated at rates of at least 60 cubic feet of air per minute per smoker, be equipped with a separate mechanical exhaust system, and be maintained under "negative pressure" to prevent any smoke from migrating to surrounding areas. As L&I Director Mark Brown has acknowledged, for many businesses, especially small businesses, the costs of providing such facilities will be prohibitive. L&I has issued the regulation just described despite the absence of substantial evidence, required by the Washington Industrial Safety and Health Act (RCW 49.17 et seq.), that environmental tobacco smoke poses a significant risk to human health at the levels actually found in offices within the State of Washington. As the Joint Administrative Rules Review Committee of the Washington State Legislature has recently concluded, the L&I regulation also is inconsistent with two specific legislative enactments -- the Washington Clean Indoor Air Act of 1986 (RCW 70.160) and the Indoor Air Quality in Public Buildings Act of 1989 (RCW 70.160.060) -- limiting L&I's authority to regulate smoking. In addition, the same Committee has concluded that L&I failed to obey the requirements of the Washington Regulatory Fairness Act (RCW 19.85.010). For all of the reasons just described, plaintiffs seek a declaratory judgment that the regulation is invalid and unenforceable and an injunction to restrain enforcement.

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PARTIES

2. Plaintiff Aviation West Corporation, a corporation existing under the laws of the State of Washington with offices at 2800 South 192nd, Seat-Tac, Washington, is engaged in the business of ground handling of air cargo in the State of Washington. As further described below, it will be directly and adversely affected [REDACTED], referred to hereinafter as the "Environmental Tobacco Smoke Regulation" or the "ETS regulation."

3. Plaintiff Competition Specialties, Inc., a corporation existing under the laws of the State of Washington with offices at 2402 West Valley Highway North, Auburn, Washington 98001, is engaged in the business of supplying wholesale high performance parts and accessories to the auto parts trade. As further described below, it will be directly and adversely affected by the ETS regulation.

4. Plaintiff Computer Group Inc., a corporation existing under the laws of the State of Washington with offices at 411 108th Avenue, N.E., Suite 660, Bellevue, Washington, is engaged in the business of providing permanent placements and temporary contracts for computer professionals and will be adversely affected by the ETS regulation. Since Computer Group Inc., is owned and operates independently from all other businesses, has the purpose of making a profit, and has eight employees, it is a "small business" within the meaning of RCW 43.31.025.

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5. Plaintiff American Tobacco Company, a corporation organized under the laws of the State of Delaware, is a manufacturer of cigarettes sold in the State of Washington and will be adversely affected by the ETS regulation.

6. Plaintiff Brown & Williamson Tobacco Corporation, a corporation organized under the laws of the State of Delaware, is a manufacturer of cigarettes sold in the State of Washington and will be adversely affected by the ETS regulation.

7. Plaintiff Lorillard Tobacco Company, a corporation organized under the laws of the State of Delaware, is a manufacturer of cigarettes sold in the State of Washington and will be adversely affected by the ETS regulation.

8. Plaintiff Philip Morris, Inc., a corporation organized under the laws of the State of Virginia, is a manufacturer of cigarettes sold in the State of Washington and will be adversely affected by the ETS regulation.

9. Plaintiff R. J. Reynolds Tobacco Company, a corporation organized under the laws of the State of New Jersey, is a manufacturer of cigarettes sold in the State of Washington and will be adversely affected by the ETS regulation.

10. Defendant Department of Labor and Industries ("L&I"), an administrative agency of the State of Washington, is the entity that issued the ETS regulation and caused its adoption on March 16, 1994.

11. Defendant Mark O. Brown, Director of L&I, signed the Administrative Order of Adoption No. 93-18, which implemented the permanent adoption of the ETS regulation on March 16, 1994, with an effective date of September 1, 1994.

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JURISDICTION

12. Jurisdiction over this action arises under RCW 34.05.570(2)(b), which provides in effect that the validity of any State-promulgated administrative rule or regulation may be determined upon petition for a declaratory judgment addressed to this Court when it appears that such rule or regulation, or its threatened application, threatens to interfere with or impair the legal rights or privileges of plaintiffs-petitioners.

13. This Court also has inherent power to review the challenged acts of defendants under the Washington Constitution, Article 4, sections 1 and 6, on the grounds that they are arbitrary and capricious and contrary to law.

FACTUAL AND STATUTORY BACKGROUND

14. In 1973 the Legislature of the State of Washington enacted the Washington Industrial Safety and Health Act ("WISHA"), RCW 49.17 et seq., and conferred upon L&I general authority to promulgate workplace health and safety standards. RCW 49.17.050(4). At no time in the next 20 years did L&I ever promulgate or seek to promulgate any regulations or standards with respect to smoking in the workplace.

15. In 1986 the Legislature enacted the Washington Clean Indoor Air Act (RCW 70.160 et seq.), stating in part that the Legislature considered it "necessary to prohibit smoking in public places, except in areas designated as smoking places." RCW 70.160.010. An early version of this 1986 legislation also would have prohibited smoking in many private workplaces. But before enactment the latter

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provisions were deleted, and the final Act explicitly provided that it "is not intended to regulate smoking in a private enclosed workplace." RCW 70.160.060. Thus in 1986 the Legislature rejected proposals that smoking in private office spaces should be regulated.

16. In 1989 the Legislature enacted the Indoor Air Quality In Public Buildings Act (RCW 70.162.005 et seq.), which directed L&I to make recommendations to the Legislature as to whether, among other things, it would be appropriate to regulate smoking in private workplaces, either under WISHA or other legislation. See RCW 70.162.020(2). The legislative history of the 1989 Act explicitly reflects an intention that L&I should develop "regulatory recommendations" and "recommend measures of implementing these recommendations to the Legislature," thereby reserving to the Legislature the final decision as to whether and how smoking in private workplaces would be regulated.

17. Despite the foregoing limitations on the authority of L&I to regulate smoking in private workplaces, in December 1993 defendants L&I and Brown initiated steps in December 1993 toward direct regulation by L&I of smoking in private workplaces. In the period December 7-9, 1993, defendants held public hearings during which voluminous comments and testimony were submitted on the issue.

18. During such public hearings the plaintiffs and others submitted a large volume of material contending, inter alia, that, (a) given the legislative background summarized above, defendants are without legal authority (in the absence of further legislative action) to regulate smoking in private workplaces,

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(b) that neither the defendants nor anyone else has ever identified substantial scientific evidence that environmental tobacco smoke in the workplace constitutes a "significant risk" to human health, and (c) that in the absence of such scientific evidence any efforts by defendants to regulate smoking in private workplaces would exceed whatever legal authority WISHA has conferred upon defendants with respect to the regulation of smoking in private workplaces.

19. Accepting none of the foregoing contentions, defendants adopted the ETS regulation on March 16, 1994. The regulation prohibits smoking beginning September 1, 1994, in all private office spaces, including such associated spaces as cafeterias or meeting rooms, with the exception of "designated enclosed smoking rooms." The designated smoking rooms must be negatively pressurized in such a way as "to prevent smoke migration to surrounding non-smoking areas" as a result of the installation and operation of "a separate mechanical exhaust" that exhausts air "directly outside" at the rate of at least 60 cubic feet per minute per smoker. WAC [REDACTED]

20. The Washington Administrative Procedure Act ("WAPA") explicitly requires that a regulating agency shall place into the rulemaking file "a concise explanatory statement about the rule, identifying . . . the agency's reasons for adopting the rule." RCW 34.05.355. This statutory requirement has been interpreted to mean, inter alia, that each such "concise explanatory statement" with respect to a new regulation must provide sufficient information about the agency's views to allow a

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reviewing court to understand the agency's reasons for adopting the regulation and for rejecting the arguments made against it.

21. During the development of the ETS regulation the defendants prepared a document that purports to be a "concise explanatory statement" of the kind required by WAPA. In fact, however, the only "explanatory" matter contained within the purported "concise explanatory statement" consists of a single paragraph that, when reduced to its essence, simply asserts that "there is a substantial body of evidence," including certain materials referred to by the U.S. Environmental Protection Agency, "indicating that environmental tobacco smoke has a causal connection to" both lung cancer and cardiovascular disease. In fact, the question whether and under what circumstances such a causal connection may exist raises a series of significant factual and scientific issues that were raised in the comments submitted by some of the plaintiffs during the regulatory process and that are nowhere addressed in the "concise explanatory statement." In addition, the comments submitted by plaintiffs and others raised significant legal questions as to the defendants' statutory authority to regulate smoking in private workplaces (see Paragraphs 15-16 and 22 of this Complaint). Defendants' "concise explanatory statement" does not address any of those legal issues. Nor does the statement explain the reasons for L&I's decision to adopt various regulatory requirements, including the requirements that smoking occur only in "designated enclosed smoking rooms" equipped with a special mechanical exhaust system.

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22. Defendants regard the ETS regulation as embodying a new set of "general occupational health standards" as authorized by WISHA, RCW 49.17.010 et seq. Defendants' position in addition is that the ETS regulation's prohibition of smoking in private offices is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment" within the meaning of RCW 49.17.020(6) and is thus authorized under that statutory provision. As authoritatively interpreted, the legal effect of the latter WISHA provision is that the ETS regulation can be valid only if the defendants have compiled a record containing substantial evidence that environmental tobacco smoke poses "a significant risk" of material health impairment at levels currently found in offices within the State of Washington and that a complete prohibition against all smoking in such offices is reasonably necessary to reduce the risk to levels at which the risk would be insignificant.

23. In fact, neither the record compiled by the defendants during the regulatory process nor the "substantial body of evidence" referred to in defendants' "concise explanatory statement" contains substantial evidence of the kind required by WISHA.

24. During the defendants' development of the ETS regulation, they recognized that they were required to comply with the Washington Regulatory Fairness Act (RCW 19.85.010 et seq.). The Washington Regulatory Fairness Act requires administrative agencies to consider the impact of proposed regulations on small business entities and to take reasonable steps to mitigate any disproportionate impact on small businesses that are identified. RCW 19.85.030(1) and (2).

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Defendants did in fact prepare a document purporting to be a "Small Business Economic Impact Statement" in which they concluded "that the proposed regulation is likely to have a disproportionate impact on small businesses." They failed, however, to take reasonable steps to mitigate such disproportionate impact, as required by the Washington Regulatory Fairness Act.

25. One such step, which was considered and tentatively approved by defendants, was to give small businesses "a longer time to comply" with the proposed ETS regulation than the time accorded to non-small businesses. Specifically, defendant L&I tentatively decided that, whereas the effective date for non-small businesses should be September 1, 1994, the effective date for small businesses should be March 1, 1995. As finally adopted, however, the text of the regulation requires compliance by all businesses, large and small, by September 1, 1994. As a result, even though it would be entirely feasible for the ETS regulation to provide small businesses with "a longer time to comply," in its final form it does not do so.

26. WAPA explicitly requires that, where an administrative agency has changed the text of a proposed rule or regulation, the agency must provide "a description of any difference between the text of the proposed rule . . . and the text of the rule as adopted, . . . stating the reason for change." RCW 34.05.355(1)(b). At no time have the defendants provided the required description or stated the reasons for their having changed the text of the ETS regulation as described in the preceding paragraph.

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27. On June 21, 1994, the Joint Administrative Rules Review Committee of the Washington State Legislature held a hearing on the question, inter alia, whether the ETS regulation was consistent with the intent of the Legislature as expressed in the statutory provisions upon which the regulation is allegedly based. During the June 21 hearing the Committee received written and oral testimony from the defendants, who attempted to defend their position that the regulation was within the intent of the Legislature when it enacted the relevant statutes. At the same time the Committee also considered whether, in promulgating the ETS regulation, L&I had adequately taken into account the economic impact of the ETS regulation on small business firms.

28. By letter dated June 23, 1994, the Joint Administrative Rules Review Committee notified the defendants that the Committee had concluded that, given the provisions of the Washington Clean Indoor Air Act and the Indoor Air Quality In Public Buildings Act, the ETS regulation is "not within the intent of the Legislature" and thus "goes beyond [L&I's] statutory authority." The same letter also expressed the conclusion that the defendants "did not adequately investigate the economic impact of [the regulation] on small business" and "did not comply with the Regulatory Fairness Act." On those grounds the Committee recommended "suspension of the rule" and "directed" the defendants "to file notice of a hearing" on the Committee's findings "within 30 days of receipt of this letter." On information and belief, the defendants have now decided to hold such a hearing on August 18, 1994, but have not indicated any intention to suspend the September 1 effective date of the

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regulation in order to accommodate the hearing process and subsequent proceedings required by RCW 34.05.640.

29. The ETS regulation, if enforced as written, will have a direct adverse financial impact on plaintiffs Aviation West, Competition Specialties, Inc., and Computer Group Inc. Such plaintiffs will lose the services of smoking employees during "smoking breaks," could lose employees because of the inconveniences associated with such smoking breaks, and could face the financial burden of providing "enclosed smoking rooms" with the necessary exhaust equipment (see Paragraph 19 above). Defendant Mark O. Brown has been quoted as saying that the burdens of compliance will be such that it simply will not be possible for most businesses to provide the required "enclosed smoking break rooms." The financial costs involved for employers throughout the State of Washington would, though incalculable, have a significant adverse effect on the economy of the State of Washington.

30. Defendants' decision to advance the compliance date for small business from March 1, 1995, to September 1, 1994 (see paragraph 25), will have an additional adverse financial impact on plaintiff Computer Group Inc., which is a small business, and other small businesses in the State of Washington. Since defendants have stated (in their purported "Small Business Economic Impact Statement" at 14) that more than 95% of all employers in the State of Washington are small businesses, each of which will be adversely affected by the change in the compliance date, the total adverse impact on the State's economy will be significant.

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31. Because the ETS regulation is intended to reduce, and will have the effect of reducing, tobacco smoking in private offices throughout the State of Washington, it will necessarily have a significant adverse impact on the tobacco sales of plaintiffs American Tobacco Company, Brown & Williamson Tobacco Company, Lorillard Tobacco Company, Philip Morris, and R. J. Reynolds Tobacco Company within the State of Washington.

FIRST CAUSE OF ACTION

33. Plaintiffs hereby incorporate by reference the previous paragraphs of this Complaint.

34. Given the provisions of the Washington Clean Indoor Act and the Indoor Air Quality In Public Buildings Act as enacted in 1986 and 1989 respectively (see Paragraphs 15 and 16 above), defendants were and are without statutory authority to promulgate an administrative regulation that prohibits or otherwise restricts smoking in private workplaces. Since the ETS regulation does more than recommend regulatory measures to the Legislature, to which is reserved the final decision as to whether and how smoking in private workplaces will be regulated, the ETS regulation is null and void as an action taken in excess of defendants' statutory authority.

SECOND CAUSE OF ACTION

35. Plaintiffs hereby incorporate by reference the previous paragraphs of this Complaint.

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36. As recited in Paragraph 22 above, an occupational health standard promulgated by defendants pursuant to WISHA, RCW 49.17.010 et seq., can be valid only if defendants have compiled a record containing substantial evidence that the regulated substance (here, environmental tobacco smoke) poses "a significant risk" of material health impairment at levels currently found within the regulated spaces (here, private offices) and that the required level of exposure (here, a zero level) is reasonably necessary to reduce the risk to levels at which the risk would be insignificant. Since neither the record compiled by these defendants nor the "substantial body of evidence" referred to by them in their "Concise Explanatory Statement" (see Paragraph 21 above) contains substantial evidence to that effect, the ETS regulation is null and void as an action taken in excess of defendants' statutory authority under WISHA.

THIRD CAUSE OF ACTION

37. Plaintiffs hereby incorporate by reference the previous paragraphs of this Complaint.

38. The ETS regulation is invalid under the Washington Administrative Procedure Act ("WAPA") because it exceeds the statutory authority of the agency, was adopted without compliance with statutory rulemaking procedures, or could not conceivably have been the product of a rational "decision-maker" within the meaning of RCW 34.05.570(2)(c).

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FOURTH CAUSE OF ACTION

39. Plaintiffs hereby incorporate by reference the previous paragraphs of this Complaint.

40. Although defendants have prepared a document bearing the title "Concise Explanatory Statement" that purportedly contains their "reasons for adopting [REDACTED] (i.e., the ETS regulation), that document in fact fails to comply with the requirements of WAPA, RCW 34.05.355, in that it fails to provide sufficient information about the agency's views to allow this Court to understand the agency's reasons for adopting the regulation and for rejecting the arguments made against it. Thus it fails to identify the major issues raised by these plaintiffs and others during the regulatory proceeding; it fails to state the principal arguments for and against adoption of the regulation; it fails to state the reasons for overruling the considerations against the regulation; and it fails to state the reasons why the agency reached the conclusion that it did. See Paragraphs 20 and 21 above. This failure to comply with an explicit statutory requirement renders the ETS regulation null and void.

FIFTH CAUSE OF ACTION

41. Plaintiffs hereby incorporate by reference the previous paragraphs of this Complaint.

42. Although defendants, purporting to comply with the Washington Regulatory Fairness Act, RCW 19.85.0101 et seq., have prepared a document bearing the title "Small Business Economic Impact Statement" in connection with the

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ETS regulation, and although defendants have conceded therein "that the proposed regulation is likely to have a disproportionate impact on small businesses," thereby imposing upon the defendants a duty to take all feasible steps to reduce the economic impact of the regulation on small business, defendants have violated that duty by failing to take a number of feasible steps to reduce such impact, including the granting to small businesses of "a longer time to comply" with the ETS regulation. See Paragraphs 24 and 25 above. Because the terms of the ETS regulation thus violate the requirements of the Washington Regulatory Fairness Act, the regulation is null and void.

SIXTH CAUSE OF ACTION

43. Plaintiffs hereby incorporate by reference the previous paragraphs of this Complaint.

44. As alleged in Paragraph 25, during their deliberations with respect to the proposed ETS regulation, the defendants proposed a text that would have required non-small businesses to comply with the proposed rule by September 1, 1994, but that would have allowed small businesses an additional six months by affording them an effective date of March 1, 1995. However, the text of the rule as adopted was changed so as to require all businesses, large and small, to comply by September 1, 1994. Accordingly, as alleged in Paragraph 26 above, the defendants had a duty to provide "a description" of the difference between the initial proposal and the final version, "stating the reason for the change." RCW 34.05.355(1)(b). No such

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description having been provided, defendants have committed a breach of that statutory duty, and the ETS regulation is therefore null and void.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that an order be entered against defendants as follows:

45. Declaring that the ETS Regulation challenged in this action, WAC [REDACTED], "exceeds the statutory authority of the agency, was adopted without compliance with statutory rule-making procedures, or could not conceivably have been the product of a rational decision-maker" within the meaning of RCW 34.05.570(2)(c) and hence that the regulation is invalid.

46. Enjoining enforcement of such regulation prior to the time, if ever, when such violations shall have ceased.

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47. Providing such other and further relief as this Court may deem proper.

DATED this ____ day of _____, 1994.

Respectfully submitted,

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